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90-1141

Supreme Court, U.S.

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# In the Supreme Court of the United States

OCTOBER TERM, 1990

RAFEH-RAFIE ARDESTANI, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

*ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT*

## BRIEF FOR THE RESPONDENT

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**QUESTION PRESENTED**

Whether the Equal Access to Justice Act, 28 U.S.C. 2412(d)(3) and 5 U.S.C. 504(a)(1), authorizes the award of attorneys fees and expenses for an administrative deportation proceeding before the Immigration and Naturalization Service.

(I)

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**OPINIONS BELOW**

The opinion of the court of appeals (Pet. App. A1-A40) is reported at 904 F.2d 1505. The opinion of the Board of Immigration Appeals (Pet. App. A43-A47) is unreported.

**JURISDICTION**

The judgment of the court of appeals was entered on July 6, 1990. A petition for rehearing was denied on September 5, 1990. Pet. App. A41-A42. The petition for a writ of certiorari was filed on December 3, 1990. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

**STATEMENT**

Petitioner, an Iranian citizen, entered the United States as a visitor in December 1982. She remained in this country lawfully until the end of May 1984, and then sought

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political asylum. The Immigration and Naturalization Service (INS) denied her application and issued an order to show cause why she should not be deported. Petitioner conceded her deportability, but renewed her asylum application. The immigration judge granted her request for asylum, and INS did not seek further administrative review. Pet. App. A4-A7.

Petitioner subsequently filed an application for attorneys fees and expenses, asserting jurisdiction under the Equal Access to Justice Act (EAJA), 5 U.S.C. 504(a)(1). Pet. App. A7. The immigration judge found petitioner entitled to fees under EAJA, and awarded fees in the amount of \$1,071.85. *Ibid.* INS appealed the fee award to the Board of Immigration Appeals (BIA), which held that EAJA does not apply to administrative deportation proceedings, relying upon a regulation to this effect promulgated by the Attorney General. *Id.* at A43-A47; see 28 C.F.R. 24.103.

Petitioner sought review in the court of appeals of the BIA holding. See 5 U.S.C. 504(c)(2). The Eleventh Circuit affirmed, with Senior District Judge Pittman (sitting by designation) dissenting. Pet. App. A1-A40. The panel majority held that an administrative deportation proceeding is not an "adversary adjudication" as that term is defined in 5 U.S.C. 504(b)(1)(C), because it is not "an adjudication under [5 U.S.C.] section 554." Agreeing with three other circuits,<sup>1</sup> the majority held that "under section 554" means "governed by" or "subject to" Section 554—*i.e.*, the Administrative Procedure Act (APA). Pet. App. A19. But the procedures prescribed in Section 242 of the Immigration and Nationality Act, 8 U.S.C. 1252—not the procedures of the

<sup>1</sup> See *Clarke v. INS*, 904 F.2d 172 (3d Cir. 1990); *St. Louis Fuel & Supply Co. v. FERC*, 890 F.2d 446 (D.C. Cir. 1989); *Owens v. Brock*, 860 F.2d 1363 (9th Cir. 1988). Contra *Escobar Ruiz v. INS*, 838 F.2d 1020 (9th Cir. 1988).

APA—govern deportation proceedings. *Marcello v. Bonds*, 349 U.S. 302 (1955). Because Section 554 has no application, a deportation proceeding is not an "adversary adjudication" for which EAJA fees may be awarded. Pet. App. A19-A22. Judge Pittman agreed with the holding and reasoning of *Escobar Ruiz v. INS*, 838 F.2d 1020 (9th Cir. 1988). See Pet. App. A34-A40.

## ARGUMENT

The petition for a writ of certiorari should be granted. Although the decision of the court of appeals is correct, it squarely conflicts with the decision of the Ninth Circuit in *Escobar Ruiz v. INS*, *supra*, and review by this Court is warranted to establish uniformity among the circuits on the question of the applicability of EAJA to INS administrative deportation proceedings.<sup>2</sup> In addition, a decision by this Court will provide guidance on the scope of the EAJA definition of "adversary adjudication" in Section 504(b)(1)(C), which will assist in determining whether EAJA fees are available for other administrative proceedings conducted pursuant to statutes that mandate procedures that are similar to those required by the APA.

The Eleventh Circuit properly rejected the holding and the reasoning of *Escobar Ruiz*, as has the Third Circuit in *Clarke v. INS*, 904 F.2d 172 (1990), another recent decision dealing with the issue of the applicability of EAJA to INS administrative deportation proceedings. Similarly, two other Circuits have rejected the reasoning of *Escobar*

<sup>2</sup> The Solicitor General has recently filed a petition for certiorari in *Immigration and Naturalization Service v. Rivas*, No. 90-1223, a case in which the Ninth Circuit followed its *Escobar Ruiz* holding. We suggested that the Court hold *Rivas* pending its disposition of the instant case.

*Ruiz* with respect to the meaning of the EAJA definition of "adversary adjudication." See *St. Louis Fuel & Supply Co. v. FERC*, 890 F.2d 446, 449-451 (D.C. Cir. 1989) (holding that certain FERC administrative proceedings are not covered by EAJA); *Owens v. Brock*, 860 F.2d 1363, 1365-1366 (6th Cir. 1988) (holding that EAJA does not apply to Federal Employees Compensation Act proceedings).

As the court below and the Third, Sixth and D.C. Circuits have recognized, *Escobar Ruiz* misinterpreted the legislative history of EAJA and ignored the principle that a waiver of sovereign immunity must be construed strictly in favor of the sovereign. Pet. App. A11-A27; *Clarke*, 904 F.2d at 173-178; *Owens*, 860 F.2d at 1365-1366; *St. Louis Fuel & Supply Co.*, 890 F.2d at 449-451. Moreover, as both the court of appeals in the instant case and the Third Circuit in *Clarke* observed, specific provisions of the Immigration and Nationality Act also bar fee awards for the administrative proceedings in question, and EAJA has not repealed these provisions. Pet. App. A26-A32; *Clarke*, 904 F.2d at 177. Thus, the court in the case at bar correctly declined to follow *Escobar Ruiz*. In light of the disagreement among the circuits on the significant, recurring question of the scope of the EAJA definition of an "adversary adjudication," however, review by the Court is warranted in this case.

### CONCLUSION

The petition for a writ of certiorari should be granted. Respectfully submitted.

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